IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 941

UNITED STATES OF AMERICA *ex rel.*

WINFRED WILLIAM LYNN,

Petitioner,

v.

COLONEL JOHN W. DOWNER, Commanding Officer at Camp Upton, New York

Respondent.

Motion for Leave to File Brief as *Amicus Curiae.*

Permission having been granted by both parties, the undersigned, as counsel for the National Association for the Advancement of Colored People, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

May 15, 1944.

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BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE.*

Preliminary Statement.

The National Association for the Advancement of Colored People has been in existence for thirty-five years as a membership organization consisting of hundreds of thousands of members of both the Negro and white races. It is interested in the defense of the constitutional and legal rights of Negroes. Its special interest in this case is apparent from the reference by Judge CLARK in his dissenting opinion in the United States Circuit Court of Appeals (R. p. 70) to the letter of the Secretary of the Association to Senator Wagner, read by the Senator when he offered his amendment to the Selective Training and Service Act relating to the prohibition of discrimination on account of race or color.

This case is of central importance to the more than thirteen million members of the Negro race in the United States, and members of other minority races in the United States, for it represents the second time in the history of our country that the question of discrimination by the Federal Government against a group of persons by reason of their color or race, is presented to the United States Supreme Court. In the case of *Hirabayashi* v. *United States*,[1] the Court considered the question of the constitutionality of the curfew order issued by the Commander of a West Coast military area, which required all persons of Japanese ancestry resident in the area to be in their places of residence between a certain hour in the evening and a certain hour in the morning. Mr. Justice MURPHY, in his concurring opinion, said (p. 111): "Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry." He said that in his opinion the decision in that case "goes to the very brink of constitutional power" (p. 111).

We respectfully submit that the facts in the case *sub judice* take the case *beyond* the brink of constitutional power of the Federal Government.

The opinion of Judge SWAN for the United States Circuit Court of Appeals discusses at length the history of the anti-discrimination provisions in the Selective Training and Service Act. It was his view that the interpretation by the Court of these provisions was borne out by the following considerations:

1. The debates in Congress when the bills were pending;

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[1] 320 U. S. 81.

2. The Army's history of separate regiments of whites and Negroes; and

3. The contention that selection by racial quotas was made necessary by segregation in training, and that doing away with the former may lead to confusion with respect to the latter.

We submit that the Court committed error by considering the foregoing matters; for the statutory provisions against discrimination in the selection and training of men under the Selective Training and Service Act are entirely free from any ambiguity or uncertainty. The Act prohibits "discrimination", and discrimination means nothing more nor less than differentiation or distinction. The separation of races means a distinction between the races, a differentiation in treatment between the races, discrimination between the races.

The essence of the Selective Service scheme is a selection of individuals by lot, each to be called for military service in order determined solely by chance. The separate listing of Negro and white registrants and separate calls under racial quotas as now practiced and admitted on the present record, substitutes for the operations of chance, as contemplated by the Act, the will of the persons administering the Act as to whether persons selected on any and every call shall be of one race or another. This is more than racial discrimination. It is racial discrimination in violation of the basic policy and theory of Selective Service legislation.

I.

The lower Court committed error when it attempted to interpret the language of the Act by reference to the debates in Congress.

It is well-settled that the intention of Congress is to be ascertained primarily from the language used in the statute. In *United States* v. *Standard Brewery*,[2] Mr. Justice DAY said:

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."

In *United States* v. *Missouri Pacific Railroad Co.*,[3] Mr. Justice BUTLER said:

> "It is elementary that where no ambiguity exists there is no room for construction. * * * Appellants seek to support the view for which they contend by some of the legislative history of the enactment and especially by explanatory statements made by Senator Elkins in connection with the report of the majority of the Senate committee submitting the bill for the act in question. Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as

[2] 251 U. S. 210, at p. 217.

[3] 278 U. S. 269, at p. 277.

the final expression of the meaning intended. *And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed".*[4]

The language of the Act is not of doubtful meaning; adherence to the letter of the law would not lead to injustice or absurdity or to contradictory provisions. Under the circumstances the lower Court committed error when it attempted to interpret the language of the Act by reference to the debates in Congress.

II.

The lower Court committed error when it considered other legislation relating to separate regiments.

Since the language of the Act is not uncertain or ambiguous, the lower Court committed error when it gave consideration to what it assumed to be the general policy of Congress as disclosed by the course of legislation relating to the Army's history of separate regiments of whites and Negroes; for the rule requiring statutes in *pari materia* to be construed together is a rule of construction that is to be applied as an aid in determining the meaning of a doubtful statute and cannot be invoked where the language of the statute is clear and unambiguous.

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[4] Italics supplied.

See also:

Russell Motor Car Co. v. *United States,* 261 U. S. 514, at p. 522;

Commissioner of Immigration of Port of New York v. *Gottlieb,* 265 U. S. 310.

As was said by Mr. Justice BRANDEIS in *Greenport Basin & Construction Co.* v. *United States*:[5] "As the language of the Act is clear, there is no room for the argument of plaintiff drawn from other * * * measures."

III.

The lower Court committed error when it considered the Act in the light of assumed or projected consequences.

Since the language of the Act adequately expresses the intention of Congress, it must be given effect regardless of any assumed consequences, and the lower Court committed error when it considered what effect, what inconvenience or hardship, a construction other than that adopted by it might cause. A breakdown of segregation in selection may or may not lead to a breakdown of segregation in training. In the absence of any ambiguity in the language of the Act it is not for the Court to speculate what may be the consequences of a decision that the setting up of racial quotas for the selection of men is a violation of the Selective Training and Service Act.

It was said by the Court in *United States* v. *Missouri Pacific Railroad Co., supra*:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed, and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as

[5] 260 U. S. 512, at p. 516.

written, must be relieved by legislation. * * * Construction may not be substituted for legislation."[6]

IV.

Selection by racial quotas is "discrimination" within meaning of the Act.

The position taken by the petitioner in the case *sub judice* with respect to the meaning of the term "discrimination" as used in the Act, is supported by the opinion of Mr. Chief Justice STONE in the *Hirabayashi* case, *supra*. Said the Chief Justice (p. 100):

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

It will be noted that in the above passage the Chief Justice spoke of discrimination in the sense of "*distinctions* between citizens".

In the same case Mr. Justice MURPHY, in a concurring opinion, said (p. 110):

> "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been

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[6] 278 U. S. 269, at pp. 277-278.

See also:

Commissioner of Immigration of the Port of New York v. *Gottlieb*, *supra*, at p. 313;
Corona Coal Company v. *United States*, 263 U. S. 537, p. 540.

> torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. * * * To say that any groups cannot be assimilated is to admit that the great American experiment has failed, * * *."

Note should be taken of the fact that Mr. Justice MURPHY, too, in the above passage spoke of "distinctions based on color and ancestry" and not discrimination; for discrimination means "distinction based on color and ancestry".

It is apparent from the opinions of the various Justices in the *Hirabayashi* case that the curfew order was sustained only because of the critical military situation which prevailed on the Pacific Coast in the Spring of 1942, and the urgent necessity of taking immediate action to forestall sabotage and espionage. The opinion of the Chief Justice narrowly limits the scope of the decision to the facts in that case (p. 102).

In the instant case no critical military situation exists which necessitates the selection of men for the armed forces through quotas based on race distinctions. Furthermore, the Act of Congress clearly prohibits such differentiation on the basis of race or color—a situation entirely different from that of the *Hirabayashi* case, where a military order was made which expressly distinguished between one race and another, and this order was validated by an express Act of Congress; and even there the Court held that the order and the Act of Congress came to the very brink of constitutional power.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, and petitioner should be discharged.

Respectfully submitted,

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CITATIONS

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UNITED STATES OF AMERICA EX REL. WINFRED WILLIAM LYNN, PETITIONER

v.

COLONEL JOHN W. DOWNER, COMMANDING OFFICER AT CAMP UPTON, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The majority (R. 63–69) and dissenting (R. 69–74) opinions in the circuit court of appeals are reported at 140 F. (2d) 397.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 21, 1944 (R. 75). The petition for a writ of certiorari was filed on April 28, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner's induction into the Army was illegal by virtue of the fact that he was called as one of an all-negro quota.[1]

STATUTES AND REGULATIONS INVOLVED

The Selective Training and Service Act of 1940, as amended (50 U. S. C. App., Supp. III, Sections 303 (a) and 304 (a), in pertinent part provides:

> SEC. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: *Provided,* • • • That within the limits of the quota determined under section 4 (b) for the subdivision in which he resides, any person, regardless of race or color, between the ages of eighteen and forty-five, shall be afforded an opportunity to volunteer for induction into the land or naval

[1] As we shall show (*infra*, pp. 10–12), there may also be a question as to whether the present case has become moot by virtue of the fact that petitioner is no longer in the custody of respondent.

Although the petition for a writ of habeas corpus alleged that petitioner had been inducted in violation of the Fifth Amendment to the Constitution of the United States, the petition for a writ of certiorari limits the question presented to one of violation of the nondiscrimination provisions of the Selective Training and Service Act of 1940.

forces of the United States for the training and service prescribed in subsection (b), but no person who so volunteers shall be inducted for such training and service so long as he is deferred after classification: *Provided further,* That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: *Provided further,* That no men shall be inducted for such training and service until adequate provision shall have been made for such shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations, for such men, as may be determined by the Secretary of War or the Secretary of the Navy, as the case may be, to be essential to public and personal health * * *. The men inducted into the land or naval forces for training and service under this Act shall be assigned to camps or units of such forces * * *.

SEC. 4. (a) The selection of men for training and service under section 3 (other than those who are voluntarily inducted pursuant to this Act) shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but

not deferred or exempted: *Provided,* That in the selection and training of men under this Act, and in the interpretation and execution of the provisions of this Act, there shall be no discrimination against any person on account of race or color: *Provided further,* That in the classification of registrants within the jurisdiction of any local board, the registrants of any particular registration may be classified, in the manner prescribed by and in accordance with rules and regulations prescribed by the President, before, together with, or after the registrants of any prior registration or registrations; and in the selection for induction of persons within the jurisdiction of any local board and within any particular classification, persons who were registered at any particular registration may be selected, in the manner prescribed by and in accordance with rules and regulations prescribed by the President, before, together with, or after persons who were registered at any prior registration or registrations.

The Selective Service Regulations, at the time at which petitioner was ordered to report for induction, provided in pertinent part as follows:[2]

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[2] The Regulations quoted have since been amended but not in any respects pertinent to the present case or in any way reflecting a change in policy in the matter of negro and white quotas.

The petition also cites (Pet., p. 2) Sec. 623.1 of the Selective Service Regulations, which reads in part as follows:

(c) In classifying a registrant there shall be no dis-

632.1 INDUCTION CALLS BY THE DIRECTOR OF SELECTIVE SERVICE. When the Director of Selective Service receives from the Secretary of War or the Secretary of the Navy a requisition for a number of specified men to be inducted, he shall distribute the number of specified men requisitioned among the States to be called upon to furnish such men to fill such requisition. He shall then issue a call on a Notice of Call on State (Form 12) to the State Director of Selective Service of each State concerned, sending two copies thereof to the Secretary who issued the requisition. The State Director of Selective Service, upon receiving such call, shall confer with the Corps Area Commander (or representative of the Navy or Marine Corps) for the purpose of determining the number of specified men to be delivered, in order to actually induct a net of the number of the specified men in such call, and arranging the details as to the times when and the places where such men will be delivered.

632.2 INDUCTION CALLS BY THE STATE DIRECTOR OF SELECTIVE SERVICE. (a) After conference with the Corps Area Commander (or representative

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crimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.

However, it should be noted that this case involves no question of discrimination with respect to petitioner's classification.

of the Navy or Marine Corps), the State Director of Selective Service shall issue calls to local boards to meet the number agreed upon as necessary in order to fill the State call. * * *

632.3 SELECTION OF MEN TO FILL INDUCTION CALL. (a) Each local board, when it receives a call, shall select a sufficient number of specified men to fill the call. It shall first select specified men who have volunteered for induction. To fill the balance of the call, it shall select specified men from such group or groups as the Director of Selective Service may designate, provided that within a group selection shall be made in sequence of order numbers.

STATEMENT

Relator, a negro, registered for the draft with Local Board No. 261, Jamaica, Long Island. No question is raised as to the propriety of his I–A classification. On September 8, 1942, the Local Board ordered him to report on September 18 for induction into the Army (R. 58–59). The order was issued pursuant to call No. 29, directed by New York City Headquarters of Selective Service to the Local Board, which fixed as the Board's quota for September "the first 90 White men and the first 50 Negro men who are in Class I–A" and required that separate delivery lists

be made for the white and negro registrants delivered (R. 55–56).[3]

Petitioner disobeyed the Local Board's order to report for induction (R. 24) and was subsequently indicted for violation of the Selective Training and Service Act (R. 26). Following an abortive habeas corpus proceeding (see R. 5) his attorneys advised him that in order to be able to raise any issue of racial discrimination he would have to submit to induction (R. 27). The Local Board issued another order on December 10, 1942, requiring him to report for induction on December 19 (R. 56–57). This he did, and on December 19 he was inducted as a delinquent and sent to Camp Upton, New York. On December 23 the criminal proceeding against him was terminated by the entry of a *nolle prosequi*. On the same day the writ of habeas corpus in the present proceeding was issued, returnable on December 28 (R. 1, 4). The petition for the writ challenged the validity of his induction as a member of a "Negro quota," alleging that it constituted a violation of the Constitution of the

[3] Within each quota (white or colored as the case may be) the men are called strictly in accordance with their order numbers. However, the fact that negroes and whites are called separately, pursuant to separate quotas, concededly results in departures from the order in which they would be called on the basis of order numbers alone, without regard to color. (See R. 13–18.)

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United States and the nondiscrimination provisions of the Selective Training and Service Act (*supra,* pp. 3–4).

The district court ruled that no question of the effect of alleged racial discrimination on the validity of an induction was properly before it, on the view that petitioner was in fact inducted as a delinquent rather than as a member of a negro quota (R. 53). At the close of the hearing, on January 4, 1943, the court announced its decision orally, stating (R. 54): "Writ dismissed, and the relator is remanded to the authorities from whence he came." Judgment was entered accordingly on January 11, 1943 (R. 3). Petitioner's notice of appeal to the Circuit Court of Appeals for the Second Circuit was filed on January 18, 1943 (R. 2), but the stipulation as to the content of the record on appeal was not entered into until August 9, 1943 (R. 60) and the case was not argued in the circuit court of appeals until December 8, 1943 (R. 63).

The War Department advises that in the meantime, on January 9, 1943, in reliance on the district court's oral dismissal of the writ of habeas corpus and before the filing of the notice of appeal, petitioner was transferred in ordinary course from Camp Upton to the basic training center at Camp Siebert, Alabama, and that at no time since has he been in the custody of respondent. On April 20, 1943, he was transferred from Camp

Siebert to the 739th Sanitary Company at Camp Beale, California; on October 19, 1943, he was transferred to the 1962nd Service Unit Station Complement; and on October 22, 1943, he was transferred to a medical sanitary company with which he is now serving overseas with the rank of corporal. These transfers have all been in regular course. At no time did petitioner ask either the district court or the circuit court of appeals for an order requiring that he be retained in respondent's custody or otherwise within the jurisdiction of the court.[4] Respondent himself is no longer commanding officer at Camp Upton, having been retired from active duty on November 6, 1943, on account of age.

No suggestion of possible mootness was made to the circuit court of appeals. That court, rejecting the basis of the district court's decision (*supra*, p. 8), held that since petitioner's delinquency resulted from his refusal to obey the September induction order issued pursuant to the requisition for 90 whites and 50 negroes,

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[4] Rule 31 (2) of the Rules of the United States Circuit Court of Appeals for the Second Circuit is substantially identical with Rule 45 (2) of the Revised Rules of this Court. It provides: "Pending an appeal from a decision discharging a writ of *habeas corpus* after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case."

such requisition "was a direct cause of his induction into the Army and constituted * * * sufficient proof of the allegation in his petition that he was inducted as 'a member of a Negro quota' " (R. 65). It affirmed, however, with one judge dissenting (R. 69–74), the district court's dismissal of the writ of habeas corpus and held that "the statutory provisions [*supra,* pp. 3–4] which the appellant invokes mean no more than that Negroes must be accorded privileges substantially equal to those afforded whites in the matter of volunteering, induction, training and service under the Act; in other words, [that] separate quotas in the requisitions based on relative racial proportions of the men subject to call do not constitute the prohibited 'discrimination' " (R. 69).

DISCUSSION

1. On the basis of the facts set forth in the Statement (*supra,* pp. 8–9), we respectfully suggest that the case may be moot. *United States ex rel. Innes* v. *Crystal,* 319 U. S. 755, 783; cf. *Zimmerman* v. *Walker,* 319 U. S. 744; *Tornello* v. *Hudspeth,* 318 U. S. 792; *Ex parte Weil,* 317 U. S. 597; *Weber* v. *Squier,* 315 U. S. 810; *Stallings* v. *Splain,* 253 U. S. 339, 343; *Johnson* v. *Hoy,* 227 U. S. 245; *Fisher* v. *Baker,* 203 U. S. 174, 181; *Wales* v. *Whitney,* 114 U. S. 564. Respondent's custody of petitioner had terminated more than a week prior to the filing of the notice of appeal to the circuit court of appeals from the order of

the district court dismissing the writ of habeas corpus. Such termination was in regular course of Army procedure, and was taken in reliance on the order dismissing the writ.[5] Under such circumstances we believe that in order to preserve his appeal it was incumbent upon petitioner to procure an order from the court, in accordance with Rule 31 (2) of the Rules of the circuit court of appeals (see footnote 4, *supra*, p. 9), preserving respondent's custody pending appeal. Otherwise, an unfounded habeas corpus proceeding interferes unduly with the regular course of Army training procedure, by requiring the commandant of a temporary reception center such as Camp Upton to retain the petitioner in his custody throughout the whole period during which an appeal may be taken from a decision discharging the writ, even though such an appeal may never be taken.[6] We do not suggest that the deliberate

[5] As shown in the Statement (*supra*, pp. 8–9), the decision dismissing the writ was orally announced on January 4, 1943; judgment was entered accordingly on January 11; in the meantime, on January 9, petitioner had been transferred to Camp Siebert, Alabama; the notice of appeal was not filed until January 18; and the appeal was not perfected until many months later. While the transfer to Camp Siebert prior to actual entry of the order dismissing the writ may have been premature, it was validated by the entry of the order; and petitioner thus had been validly out of respondent's custody for a week at the time the notice of appeal was filed on January 18.

[6] Especially where, as here, there was such a long delay in perfecting the appeal, petitioner is in no position to complain that respondent's custody of him was not maintained.

"passing about of the body of a prisoner from one custodian to another after a writ of habeas corpus has been applied for can defeat the jurisdiction of the Court to grant or refuse the writ on the merits of the application."[1] But where, as here, the termination of respondent's custody of petitioner was authorized by the order discharging the writ, and was not in violation of any other court rule or order, we believe that there has ceased to be any controversy between petitioner and respondent, and therefore we respectfully suggest that the case is moot.

2. On the merits petitioner's contention is that his induction as a member of an all negro quota

[1] *Ex parte Catanzaro*, 138 F. (2d) 100, 101 (C. C. A. 3), certiorari denied, March 27, 1944. The *Catanzaro* case is not inconsistent with the suggested mootness of the present proceeding. There, pending an appeal from the denial of an application for a writ of habeas corpus, the petitioner had been convicted of a violation of the Selective Service Act and had been transferred from the custody of the United States Marshal to the federal penitentiary at Lewisburg, Pennsylvania. In holding that the case was not thereby rendered moot, the court pointed out that Rule 17 (1) of its Rules expressly provided, the same as does Rule 45 (1) of the Revised Rules of this Court, that "Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed", and that consequently "The only way the Marshal could explain an inability to produce the petitioner in response to the writ, if issued, would be to set up a violation of the rule of this Court, which might serve as a confession, but hardly an avoidance." No such considerations are applicable here, where the appeal is from an order *discharging* a writ of habeas corpus, and a different rule obtains. See footnote 4, *supra*, p. 9.

was illegal by virtue of the proviso of Section 4 (a) of the Selective Training and Service Act (*supra*, pp. 3–4) that "in the selection and training of men under this Act, and in the interpretation and execution of the provisions of this Act, there shall be no discrimination against any person on account of race or color". It should be noted at the outset that the words "selection and training" are so linked together in the statute as presumptively to make anything a discrimination in training if it is of a type that at an earlier stage would constitute a discrimination in selection. Yet petitioner has not challenged the propriety of the military policy of separate training and service for the white and negro races, to which the practice of fixing separate white and negro quotas in the process of selection is subsidiary.

We believe that the proviso of Section 4 (a) clearly was not intended to abrogate the long-established policy of separate training and service.[8] Senator Wagner of New York, in sponsoring an amendment to Section 3 (a) for the purpose of making the privilege of voluntary

[8] Since the Act of July 28, 1866 (c. 299, §§ 3, 4, 14 Stat. 332), statutory provision has been made for separate negro regiments. The same Congress that enacted the Selective Training and Service Act of 1940 also enacted Section 2 (b) of the National Defense Act of 1940 (c. 508, § 2 (b), 54 Stat. 712, 713), providing "that no negro, because of race, shall be excluded from enlistment in the Army for service with colored military units now organized or to be organized for such purpose."

enlistment available "regardless of race or color" (*supra*, pp. 2–3), explained that in certain branches of the service, the air forces in particular, negroes were "refused enlistments altogether", and that his amendment was designed to open all branches of the service to negroes but did not contemplate the establishment of mixed units. He stated: "There is no question of whether they are to be integrated or not. The complaint is against the refusal to permit them to serve. That is the only point I am making." (86 Cong. Rec. 10,890.) On the same day on which Senator Wagner's amendment, as adopted by the Senate, was accepted by the House Military Affairs Committee and approved by the House in Committee of the Whole, Congressman Fish of New York proposed the amendment which became the nondiscrimination provision of Section 4 (a). To the objection that the substance of the amendment was already in the bill, in the form of Senator Wagner's amendment, Congressman Fish replied: "My amendment applies to the drafted element of the personnel. * * * If a colored man is good enough to serve his country and die for it, there should be no discrimination under the provisions of this bill *in regard to his right to serve in the various branches of the Army.*" (86 Cong. Rec. 11,675.) [Italics supplied.] And Congressman Andrews, of the House Military Affairs Committee, added: "The

committee amendment applies only to those who volunteer. The amendment offered by Mr. Fish seeks to do what the War Department already states it will do under regulations, that is, draft one Negro out of every ten who are called."[9] (86 Cong. Rec. 11,676.)

It thus seems clear, first, that Congress did not contemplate requiring mixed units in training and

[9] As the majority below states (R. 69), "Congressman Thomason of Texas included in his remarks during the consideration of the Act a letter from the Joint Army and Navy Selective Service Committee which informed Congress that the selective service program contemplated separate white and Negro quotas and calls." The dissenting judge disagrees with the majority's interpretation of this letter (R. 71), but the following extract therefrom (86 Cong. Rec. 11,427) is believed to sustain the majority's interpretation:

"At the present time there is not sufficient information to make any exact estimates of quotas. As an example of the method in which a quota would be determined, these figures are submitted for your State of Texas. None of the figures are based on anything except estimates.

"Estimated number of registrants in Texas: 510,000 white, 89,000 colored.

"Estimated class I (men available):

"170,000 white
29,667 colored

"199,667 estimated total available.

"If we estimate that 40,944 residents of Texas are members of the armed forces, the quota basis for Texas then becomes 240,611.

"If we estimate that 37,944 of those in the armed forces are white and 3,000 are colored, the State of Texas would then be entitled to a credit for each of these amounts. Under a call for 400,000 men, using the above figures, Texas would furnish an estimated 24,021 men."

service, and, second, that it regarded as proper the calling of negroes and whites in numbers respectively bearing the same proportion to the total numbers of negro and white registrants. The dissenting judge in the court below states (R. 71, fn. 2): "It is easy to slip from the discrimination here, which is based solely on Army calls for men, to that stated at the end of the opinion, viz., 'separate quotas in the requisitions based on relative racial proportions of the men subject to call.'" But in fact the calls for men are based directly on the "relative racial proportions of the men subject to call." Since 10.8 percent of the registrants are colored, the military services adjust their calls with the end in view that on a national basis 10.8 percent of the men inducted will be colored. This percentage is maintained by adjusting local calls as nearly as possible to the ratios of white and colored registrants currently available in each locality. Of course, it has not always been possible to maintain monthly inductions of negroes in the ratio of the negro registration to the total registration. This was especially true at the beginning. Section 3 (a) of the Selective Training and Service Act specifically provides that "no men shall be inducted for such training and service until adequate provision shall have been made for such shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations,

for such men" (*supra*, p. 3). Also the activation of military units requires trained overhead personnel, and at the inception of Selective Service there was insufficient trained negro personnel to form the nuclei for new units. It is necessary to form new units and to secure replacements for old units in accordance with the demands of the tactical and strategic situation. Single quotas without regard to race might result in getting too many men of one race or the other at any given time, with the effect of overcrowding housing facilities and interfering with training schedules. As a result of initial difficulties in activating negro units, for a while negroes were not inducted in the ratio of the negro registration to the total registration. However, trained personnel and housing now being available, negro registrants have been called in such numbers as to make their percentage in the military services nearly equal to the percentage of negro registrants in the total registration. Full equivalence in the induction ratios was achieved by the Army in 1942, and has since been maintained. For the period from February through November 30, 1943, negroes represented 11 percent of the men delivered to the Army and 9.9 percent of those delivered to the Navy (including the Marine Corps and Coast Guard), or a total of exactly 10.8 percent of all the men delivered to the armed services.

These figures, which have been supplied by Selective Service, show that by the separate quota method Negroes are being called in numbers proportionate to their numbers in the total registration; and petitioner does not contend that any of the services, or any branches thereof, are closed to them, or that they are not subjected to exactly the same standards of acceptability as all other registrants, or that they are not afforded exactly the same treatment and facilities in training and service. The intent of Congress in enacting the nondiscrimination provision thus appears to have been fulfilled. The dissenting judge apparently concedes (R. 71, fn. 2) that the method of basing calls on the relative racial proportions of the men subject to call comes fairly close to calling Negroes in the sequence of their normal order numbers as among all registrants; and calls made without regard to race would not be adaptable to the needs of separate training and service based on a policy which Congress clearly contemplated and which petitioner does not challenge. This policy and the calls based thereon, involve no discrimination; and we therefore believe that petitioner has not established discrimination against Negroes within the prohibitions of Section 4 (a) of the Selective Training and Service Act.[10]

[10] As the court below points out (R. 66), "Even if the induction practice had been conducted without separate quotas, as he [petitioner] claims it should have been, he would now be, as he is, in the Army." Under these circumstances, a

CONCLUSION

For the foregoing reasons we believe that the decision of the court below is correct and that it presents no question requiring review by this Court. Accordingly, in the event that the Court should determine that the cause is not moot, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1944.

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slight departure from his number order sequence as among all registrants should not in any event entitle him to release from military service to which he is properly subject. Cf. *United States ex rel. Mensevich* v. *Tod*, 264 U. S. 134, 137: "The validity of a detention questioned by a petition for *habeas corpus* is to be determined by the condition existing at the time of the final decision thereon"; *Iasigi* v. *Van de Carr*, 166 U. S. 391; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 662: "A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

U. S. GOVERNMENT PRINTING OFFICE: 1944